IN THE

Supreme Court of the United States

October Term, 1946.

No. 402

WILLIAM HENRY LEDFORD,
WILLIAM RAMSEY BROCK,
W. B. LINT,
WILLIAM SAMPSON METCALF, - - - Petitioners,

versus

UNITED STATES OF AMERICA, - - - Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit

AND

BRIEF IN SUPPORT THEREOF.

HARRY B. MILLER,
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v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit (No. 10076).

Your petitioners pray that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above case on July 15, 1946, affirming their convictions in the District Court for the Eastern District of Kentucky on July 18, 1945, and in support of their petition respectfully show:

SUMMARY STATEMENT OF MATTERS INVOLVED.

The petitioners, William Henry Ledford, William Ramsey Brock, W. B. Lint and William Sampson Metcalf, were convicted on July 18, 1945, in the District Court for the Eastern District of Kentucky for a violation of Section 19, Criminal Code (Section 5508, RS; Section 51, Title 18, USCA), providing:

> "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States * * * they shall be fined not more than $5,000.00 and imprisoned not more than ten years * * *."

The petitioners herein denied all the averments of the indictment and were convicted solely upon incompetent testimony, in that the court permitted ballots, ballot boxes and other election paraphernalia to be introduced, which ruling of the court was contrary to the provisions of the laws of the United States, and petitioners were denied their constitutional rights under the laws of the United States.

After the verdict was returned these petitioners, and each of them, were sentenced to one year imprisonment and fined $100.00. After judgment had been pronounced these petitioners appealed from the District Court to the United States Circuit Court of Appeals for the Sixth Circuit, and on May 31, 1946, the Circuit Court of Appeals rendered an opinion affirming the District Court (R., pages 208-212).

Petition for rehearing was duly filed in the United States Circuit Court of Appeals and said petition was overruled, without opinion, on the 15th day of July, 1946 (R., page 214).

JURISDICTION.

1. The date of the judgment or decree to be reviewed is July 15, 1946, and this petition is filed within the time provided by law.

2. The statutory provision which is believed to sustain the jurisdiction of this court is Section 347, Title 28, of the United States Code.

SPECIFICATION OF ERRORS.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that petitioners were guilty of a violation of Section 19 of the Criminal Code (Section 51, Title 18, USCA).

2. The opinion rendered by the Circuit Court of Appeals is based entirely upon the misconstruction, misapplication of and is in conflict with the cases of:

United States v. *Reed,* 53 U. S. 361,
United States v. *Thompson,* 251 U. S. 407,
Funk v. *United States,* 290 U. S. 371.

3. The Circuit Court of Appeals refused to recognize the rights of petitioners under Title 18, Section 631 C. C. A.

4. The Circuit Court of Appeals erred in overruling petitioners' contention that State statutes and

the usages which obtain in State courts will be followed in Federal courts unless they conflict with positive provisions of Federal statutes or the law prescribing the method of procedure in a given particular.

5. The Circuit Court of Appeals erred in applying Rule 26 of the New Rules of Criminal Procedure and in failing to apply the provisions of Rule 27 thereof, which is applicable in this case, with reference to official records and entries in criminal cases.

6. The Circuit Court of Appeals decided this case, as shown by the opinion, merely by adding inference to inference and in direct conflict with the dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Black and Mr. Justice Murphy, wherein it is stated:

> "Civil liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference." (United States v. Classic, 313 U. S. 299.)

7. The Circuit Court of Appeals has incorrectly analyzed the record as to the facts in the case.

8. The Circuit Court of Appeals inadvertently misquoted the testimony and based its opinion largely on this misquoted portion of the testimony.

9. The Circuit Court of Appeals erred in sustaining the lower court as to the competency of certain testimony.

REASONS FOR GRANTING WRIT OF CERTIORARI.

The Circuit Court of Appeals in its opinion accepted the law of Kentucky to be that before ballots, ballot boxes or any election paraphernalia can be introduced in evidence it must first be proven clearly and satisfactorily that the ballots, ballot boxes and other election paraphernalia have been kept as the statute requires and have not been tampered with since the election, and that before they can be offered in evidence it must be proven that they are in the same condition as when the boxes left the polls and that *there has been no opportunity to tamper with them.*

However, the Circuit Court of Appeals in its opinion further states:

> "But it should be bourne in mind that the rule announced in the Kentucky cases was declared and has been applied only in relation to election contests."

The record in this case shows conclusively that the ballots, ballot boxes and other paraphernalia had been tampered with between the time they left the polls and the time they were introduced in evidence. In spite of this, the Circuit Court of Appeals, in holding that such evidence was competent, relied upon the cases of

United States v. *Reed,* 53 U. S. 361,
United States v. *Thompson,* 251 U. S. 407,
Funk v. *United States,* 290 U. S. 371.

The Circuit Court of Appeals erroneously concluded that under authority of the cases above cited,

all of this election paraphernalia was competent evidence in a criminal case, and it is maintained that the court erred in such ruling for the following reasons:

The case of United States v. Thompson, *supra*, does not in any way involve the question as to the competency of testimony, and the only question therein involved was that an indictment was quashed and re-referred by the District Attorney without order of Court. This question was raised because, under the state law, it was necessary to obtain order of court before re-referring an indictment to the grand jury. The court ruled that, under the provisions of Section 722 RS, this rule of the State is not applicable in Federal courts. In short, the Thompson case was a question of procedure rather than the competency of testimony.

In the case of Funk v. United States, *supra*, the sole question was whether or not a wife, theretofore denied the right to testify for her husband, was a competent witness for him, and in that case no question was raised as to the competency of the testimony given by a competent witness.

In the case of United States v. Reed, *supra*, the District Court ruled that a conspirator was not a competent witness under the common law. However, this Honorable Court decided that a conspirator was a competent witness, but did not discuss or conclude that a competent witness could introduce incompetent testimony.

We readily agree that this Honorable Court has in various decisions held that the dead hand of the com-

mon law is not binding and that Federal courts may construe the common law to meet changing conditions. This court has further held that common law is not immutable but flexible, and while this Honorable Court has changed the rule to a certain extent as to what witnesses are competent, they have never changed the rule on the competency of testimony given by a competent witness.

With this in mind, we call to the attention of the court the fact that an inspection of the record will positively show that these petitioners were convicted solely upon the introduction of ballots and other election paraphernalia which had been tampered with between the time of the election and their introduction at the trial in court, and such admission is in direct conflict with the rules of evidence in the State of Kentucky which have been accepted as the rules of evidence in Federal courts.

We earnestly maintain that the provisions of the State statutes and the usages which obtain in State courts will be followed in the Federal courts where there is no conflict with positive provisions of Federal statutes or the law prescribing the method of procedure in a given particular. We believe we are justified in assuming this position under the authority of King v. Worthington, 194 U. S. 44, 26 L. Ed. 652. While the Worthington case, *supra,* is a civil case, we believe we are correct in assuming that the competency of testimony in civil suits is applicable in criminal prosecutions. Taking the Worthington case in consideration, we contend that the Circuit Court of Ap-

peals should have applied in this case the Worthington decision and the provisions of Title 18, Section 631, C. C. A., in which it is stated:

> "The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by laws of the State or Territory in which the court is held."

With this in mind, we maintain that the same rule governing the competency of evidence in civil cases applies in criminal cases, and we base this conclusion upon Rule 27 of the New Rules of Criminal Procedure in the United States Court, wherein it is provided:

> "An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions."

Applying, then, Rule 27 to the decision of this court in the Worthington case, *supra,* we contend that the competency of evidence in criminal cases is the same as in civil cases and that such rule should have been applied in this case.

We, therefore, maintain that if the ballots, ballot boxes and other paraphernalia cannot be introduced under the law of Kentucky, unless it is first proven that there was no opportunity to destroy their integrity, then the same rule of evidence should control in the trial of criminal cases in Federal court. We submit this proposition to the court in all sincerity, because the safeguards provided for defendants charged with crime should not in any event be less

than those given to persons contesting an election. If these safeguards as to the introduction of ballots, ballot boxes and other election paraphernalia are to be thrown around a contestant in an election contest, most certainly they should not be denied to persons charged with crime, whose liberty is at stake. In short, this Honorable Court has always ruled that a defendant charged with crime should have the safeguards provided by the Constitution and the laws of the United States thrown around him, and we do not believe that it can, under any circumstances, be contended that more protection should be given a litigant in a civil case than to a person whose liberty is at stake.

The Circuit Court of Appeals affirmed the District Court upon an erroneous reading of the record. It will be seen in the opinion of the Circuit Court of Appeals that it "infers" the guilt of the petitioners upon the ground that certain checks issued by the county treasurer of Harlan County were endorsed by various election officers who are petitioners herein. A reading of the record on pages 74 and 75 will disclose that at least two of the checks mentioned were not endorsed by two of the petitioners herein.

HARRY B. MILLER,
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JAMES SAMPSON,
Harlan, Kentucky,
Counsel for Petitioners.

BRIEF

In Support for Petition for Certiorari.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is to be found in the official transcript of record on pages 208-212.

JURISDICTIONAL GROUNDS.

Statement of grounds upon which the jurisdiction of this court is invoked is set out in the petition to which this brief is attached.

ARGUMENT.

With the firm belief that our petition for certiorari will be granted and that we will be given an opportunity to more fully brief this case, we will undertake to make this argument as short as possible.

A reading of the record will disclose that not a single witness was introduced by the Government to prove that any of the petitioners even served at the election charged in the indictment, or that they ever wrote a ballot or deposited one in the ballot box. It could have been very easy, if these petitioners were guilty, for the Government to have introduced legal voters who appeared at the pools and proven by them, if possible, that the petitioners actually served at the election in question. Not a single witness was introduced in the District Court by the Government to

prove that any of the petitioners were at or about the polls on election day. In spite of this, the Circuit Court of Appeals in its opinion states:

> "Metcalf, election judge, and the other three appellants endorsed warrants issued by the County Court Clerk and drawn on the Treasurer of Harlan County, Kentucky, for their services as such. It is logical to *infer* that they actually served as such."

Here again, we find the Circuit Court of Appeals affirming a conviction on *inference*. However, we call the court's attention to pages 74 and 75 of the transcript to show that the court is in error, and call this court's attention to these pages and to the testimony of H. H. Howard, as follows:

> "3. Do you have the county warrants in your possession, any of them now?
>
> A. Yes, sir.
>
> COUNSEL: Will you present them please? Do you have county warrant No. 5229 payable to Henry Ledford?
>
> DEPONENT: 5229?
>
> COUNSEL: Yes.
>
> A. Yes, sir.
>
> 4. What is it for? Will you read it?
>
> A. Well, it don't say. It was issued on November 7, 1942.
>
> 5. For how much?
>
> A. $3.96.
>
> 6. Do you know what that was for?
>
> A. No, sir, I don't. I presume—

7. It doesn't show what it is for, is that right?

A. No, sir; it doesn't state on the warrant what it is for.

8. But dated November 7, 1942?

A. Yes, sir.

9. *Is it endorsed?*

A. *Yes, sir, Henry Ledford by E. Kelly.*

21. Do you have another warrant No. 5232 to Ramsey Brock?

A. Yes, sir.

22. What is it for?

A. $3.96.

23. *Is it endorsed?*

A. *It is.*

24. *By whom?*

A. *Ramsey Brock by E. Kelly.*"

It may, therefore, be seen that the opinion of the Circuit Court of Appeals not only *is based on an erroneous statement of fact but also upon mere inference.*

For the purpose of demonstrating to this Honorable Court that the ballots, ballot boxes and election paraphernalia had been tampered with between the time of the election and the time they were introduced in evidence, we call the court's attention to page 60 of the Transcript of Evidence, wherein Mrs. Ruby Middleton, custodian of the boxes, testified:

"112. And that office is open to the public?

A. Yes, sir.

113. Practically all day? And isn't it a fact that all people having any business to do with ref-

erence to deeds or any business to transact with the County Clerk, had to come into that room where these boxes were stacked during those weeks?

A. Yes, sir, people coming and going.

115. And your clerks work there?

A. Yes, sir.

118. Those boxes were moved to the basement?

A. Well, you would not exactly say the basement; under the stairway leading to the basement.

119. And the key to that entrance to the basement was turned over to K. Bailey, was it not?

A. I turned it over to him. He is the janitor of the building. I didn't have it.

121. Didn't the janitor have a lock put on?

A. Not to my knowledge. The County Court ordered a lock to go on it, the best I recall, when they fixed the room for me. They took my storage space in the basement and they gave me that and naturally they put a lock on, the best I recall.

122. Who moved the box from the county clerk's office to this room underneath the steps?

A. It is hard to find help, but with the assistance of the janitor we picked up folks.

125. You never had a key to that basement, did you?

A. No, sir, as I said, it was to the stairway.

128. From your observation of those boxes were they in a different condition from that in which they were when they had been moved from your office and put in the basement.

A. *Well, I don't know where it happened, but some of them were different. I don't know when it happened but some of them were different.*"

We, therefore, earnestly maintain that under the authority of:

Lewis v. *Hensley,* 238 Ky. 18, 36 S. W. (2d) 840,
Rich v. *Young,* 176 Ky. 813, 197 S. W. 442,
Thompson v. *Stone,* 164 Ky. 18, 174 S. W. 763,

these ballots and ballot boxes could not be introduced in a civil suit and it, therefore, follows that if the rules of evidence in civil cases are to be applied in criminal cases, this evidence should not have been accepted by the court or permitted to go to the jury, and a reading of the record and of the opinion of the Circuit Court of Appeals will lead this court to the conclusion that had the safeguards been thrown around the petitioners that should have been given them, there would have been nothing to submit to the jury in the lower court.

CONCLUSION.

The decision of the Circuit Court of Appeals involves the construction of Federal rules and decisions of this court, and is so erroneous as to constitute a departure from the usual and accepted course of judicial procedure and calls for an exercise of this court's power of supervision. The question is of great importance and will be far-reaching in that, to our knowledge, it has never been passed upon by this court. The petition should be granted.

Respectfully submitted,

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JAMES SAMPSON,
Harlan, Kentucky,
Counsel for Petitioners.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 402

WILLIAM HENRY LEDFORD, WILLIAM RAMSEY BROCK, W. B. LINT, AND WILLIAM SAMPSON METCALF, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 208–212) is reported at 155 F. 2d 574.

JURISDICTION

The judgment of the circuit court of appeals was entered May 31, 1946 (R. 207), and a petition for rehearing (R. 213) was denied July 15, 1946 (R. 214). The petition for a writ of certiorari was filed August 14, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether, in a criminal prosecution for conspiracy to stuff ballot boxes, it is incumbent on the Government to establish, as a condition of admissibility of the fraudulently voted ballots, that they are in the same condition as when deposited in the ballot boxes and that there has been no opportunity to tamper with them in the interim.

2. Whether there was evidence that the ballots alleged to have been fraudulently voted were actually tampered with prior to trial.

3. Whether the participation of petitioners as election officials was sufficiently proved.

STATUTE INVOLVED

Section 19 of the Criminal Code (18 U. S. C. 51) provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, * * * they shall be fined not more than $5,000 and imprisoned not more than ten years * * *.

STATEMENT

An indictment filed June 5, 1943, in the District Court for the Eastern District of Kentucky

charged, in substance, that petitioners, who were duly appointed election officers for Mary Helen Precinct 39–A, Harlan County, Kentucky, conspired, in violation of Section 19 of the Criminal Code, *supra,* to injure and oppress voters of that precinct in the free exercise of their right to vote for the Republican candidate for United States Senator in an election held November 3, 1942, and to have their votes counted and recorded accurately and without diminution or dilution, by falsely marking and voting a large number of blank and unvoted ballots for the Democratic candidate and placing them in the ballot box with the legal ballots (R. 2–9).[1] Petitioners were found guilty after a jury trial (R. 23), and each was sentenced to imprisonment for a year and a day and to pay a fine of $100 (R. 25–29). On appeal, their convictions were affirmed (R. 207).

The Government's evidence may be summarized as follows:

Petitioners were the duly appointed election officers for Mary Helen Precinct 39–A, Harlan County, Kentucky, in the election on November 3, 1942, of a United States Senator, Ledford being named clerk of the election, Brock, the sheriff, and Lint and Metcalf, judges (R. 40–42). Mrs. Ruby Middleton, clerk of Harlan County Court, delivered to Ledford the various election paraphernalia, such as ballots, ballot boxes, sample bal-

[1] The indictment is substantially similar to that involved in *United States* v. *Saylor*, 322 U. S. 385.

lots, copies of the names and addresses of registered voters, etc., and received a receipt therefor from him (R. 44). The ballot boxes were locked with three locks to a box, the keys for which were retained by the county commissioners (R. 46–47). Following the election, the boxes containing the voted ballots and a sack containing the unused ballots, stub book, and other materials were returned to Mrs. Middleton by Ledford and Brock (R. 45–47). For their services as election officials, county warrants in the amount of $3.00 were issued to Metcalf and Lint, and in the amount of $3.96 to Ledford and Brock. Metcalf's and Lint's warrants were endorsed by them personally. Ledford's and Brock's were endorsed, respectively, "Henry Ledford by E. Kelly" and "Ramsey Brock by E. Kelly." (R. 74–78.) The ballots voted in Mary Helen Precinct 39–A all bore the purported signatures of Ledford and Lint (R. 79).

After the ballot boxes had come in from the different precincts, they were delivered by Mrs. Middleton to the county commissioners, who unlocked the boxes, counted the ballots, and then returned the boxes to the county clerk's office, where they were stacked for several weeks. Most of the boxes were securely locked at this time, but the clerk could not swear that all were. Later the boxes were removed, still locked, to a "boxed up" storage space under a stairway leading from the courthouse lobby to the basement. The key to the

door at the head of this stairway was kept by the janitor. (R. 47–50.) About May 4, 1943, pursuant to an order of the trial court (R. 1), all the ballots, boxes, stub books, and other records for the various precincts were delivered by Mrs. Middleton to a deputy United States marshal, who issued a receipt therefor and turned them over to the deputy clerk of the trial court (R. 52–55, 66–67).

F. B. I. Agent Miller, an expert witness on document examination (R. 178–179), testified that his examination of the Mary Helen Precinct ballots disclosed that each of 110 of them bore, in addition to the pencilled markings, an indentation or impression in the form of a cross or circle, indicating to him that it lay directly beneath another ballot at the time the latter was thus marked.[2] Some of these impressions were visible to the naked eye, while others could be detected only by the use of a special apparatus. Seven of these ballots, photographically enlarged, which Miller testified bore such impressions after the names of Democratic candidates, were introduced in evidence, and he also testified that eleven additional ballots were similarly marked. (R. 180–188.)

The Government also proved that more than 40

[2] The logical inference to be drawn from Miller's testimony is that 110 ballots lying over the ballots bearing the impressions were marked for voting while they were still attached to the stub book.

persons, who were listed as registered voters in Mary Helen Precinct 39–A and whose names appeared on ballot stubs as having voted there on November 3, 1942, in fact did not vote and that all of these persons were well known to petitioners or some of them[3] (R. 82–86, 94–97, 99–114, 123–153, 154–167, 172–177, 200–203). Many of these persons had moved to other states (R. 84, 103, 106, 107–108, 111, 133, 136–137, 146–147, 175–176, 200–201) or elsewhere in Kentucky (R. 100, 104, 110, 172). Several were absent serving in the armed forces (R. 94, 108–109, 145–146, 159, 163–164) and one was missing in action (R. 142, 202). Five had never voted in their lives (R. 124, 126, 130, 132, 162–163), one was sick in a hospital (R. 102), and two were dead (R. 113, 151).

Petitioners did not take the stand and offered no evidence.

ARGUMENT

1. The principal contention urged in the petition for a writ of certiorari and the reasoning on which it is based may be stated as follows: Under Kentucky law, before ballots may be considered as properly admissible in evidence, their integrity must be proved by clear and satisfactory evidence—that is, the burden rests on the party introducing the ballots to prove that they are in

[3] The obvious purpose of this latter evidence was to show that there was no possibility that other persons falsely identified themselves to the election officials as the persons thus listed as voting.

the same condition as when they were voted at the polls, and that there has been no opportunity to tamper with them; there being no federal law specifically governing the subject, federal courts in Kentucky are bound by this state rule of evidence; the Government in this case failed thus to establish the integrity of the ballots alleged to have been falsely marked and voted by petitioners; therefore, the ballots were incompetent evidence and it was error to admit them (Pet. 5–9).

A federal court, however, is not required in criminal cases to follow the rules of evidence prevailing in the particular state in which it is located. *United States* v. *Reid,* 12 How. 361; *Logan* v. *United States,* 144 U. S. 263, 298–303. Indeed, the strict rule formerly prevailing that the rules of evidence to be applied in criminal prosecutions in a federal court, in the absence of a specific federal statute governing the subject, are the rules which were in effect in the state in which the court is located at the time of the state's admission into the Union, has been superseded by the more liberal rule providing that a federal court should apply the common law rules of evidence, with such changes as modern conditions and experience indicate are necessary. *Funk* v. *United States,* 290 U. S. 371. Such a rule, this Court has said, is the only one flexible enough to lead to "the successful development of the truth," the "fundamental basis upon which all rules of evidence must rest." Id., 381.

But in any event, as pointed out by the circuit court of appeals (R. 210), the Kentucky rule requiring that the party seeking to introduce the ballots first establish their integrity and lack of opportunity to tamper with them does not avail petitioners, for that rule was declared and has been applied only in election contests. See *Lewis* v. *Hensley,* 238 Ky. 58, 62; *Rich* v. *Young,* 176 Ky. 813, 817; *Thompson* v. *Stone,* 164 Ky. 18, 23. In such cases, involving the question of which of two rival candidates in a close contest in fact received the greater number of legally cast votes, the necessity of establishing, as a condition of admissibility of the ballots in evidence, that they are in exactly the same condition as they were when cast, and particularly that there has been no opportunity to tip the delicately balanced scales in favor of the contesting candidate by improper meddling with the ballots, is obvious. In a criminal prosecution for fraudulently stuffing ballot boxes, however, there is no reason for such a rule, and consequently no such rule is applicable. Thus, in *State* v. *Carr,* 151 Kans. 36, involving a prosecution for ballot box stuffing, the court said (p. 44):

> Defendant contends the trial court erred in permitting the ballots to be introduced in evidence for ten asserted reasons, none of which is supported by extended argument or citation of authorities, further than to show the ballots would not be admissible in evidence in an election contest because at

> the time they were taken by the county attorney they were not in the same condition as when received by the county clerk immediately after the election * * *. It must be remembered that in an election contest it is highly important that it be shown the ballots were properly preserved after being counted, and were so kept by the county clerk that no person was afforded any opportunity to tamper with them, so that in event of a recount as the result of an election contest, a wrong result might be reached. The case before us involves no rights of candidates at the election as to who received the greater number of votes.

Similarly, in *People* v. *Newsome,* 291 Ill. 11, involving a prosecution for fraudulently altering ballots, the court said (p. 17):

> It is also urged that the ballots were not properly preserved and that none of them were identified by witnesses. Whatever may be the rule as to the competency of ballots in cases of election contests, such rule does not apply to the competency of ballots in a criminal prosecution of this character. They were admissible in evidence, together with the evidence of the manner in which they had been preserved, for what they were worth, and it was for the jury to determine what weight should be given to them as evidence under all the circumstances of the case.[4]

[4] To the same effect, see *People* v. *Harrison*, 384 Ill. 201, 206-207.

The circuit court of appeals properly, we submit, adopted this view (R. 210–211). The ballots obviously were relevant evidence, and, as that court pointed out (R. 211–212), the weight to be given to them as such and to the evidence concerning their condition at the time of trial was for the jury to determine in the light of all the evidence as to the custody and handling of the ballots and boxes after the election.

2. Petitioners insist, however, that the record "positively" shows that they "were convicted solely upon the introduction of ballots and other election paraphernalia which had been tampered with between the time of the election and their introduction at the trial in court" (Pet. 7). In support of this contention, they quote (Pet. 12–13), out of context, a series of questions asked and answers given in the course of their counsel's cross-examination of Mrs. Middleton, the clerk of Harlan County Court, who had custody of the ballot boxes and other election paraphernalia from the time they were brought to her office on election night until she turned them over to the deputy United States marshal on or about May 4, 1943 (see pp. 4–5, *supra*). A reading of all of Mrs. Middleton's testimony on this subject refutes petitioners' contention. This election material had been kept in her office for several weeks and then removed to a storage space in the basement (*supra*, p. 4). Mrs. Middleton admitted that her office was open to the public and that people having

business there were in and out of the office throughout the day (R. 60). She also stated, however, that the people thus entering her office "don't get near this other material [i. e., the election material]" (R. 60), but this testimony petitioners neglect to include in the quoted colloquy. Apparently, however, petitioners mainly rely on the statement made by Mrs. Middleton in reply to the question whether, from her observation of the ballot boxes at the time she delivered them to the deputy marshal, they were in a different condition than they were when they were moved from her office to the basement. The answer given (R. 62) was:

> Well, I don't know where it happened, but some of them were different. I don't know when it happened but some of them were different.

The subsequent re-direct examination of Mrs. Middleton, however, revealed that she was not referring to the ballot boxes themselves when she stated that "some of them were different." She testified that the boxes appeared at that time to be in the same condition as when she received them (R. 63), and that she "wasn't referring to any of the material that was in the boxes when I said that some of the material was gone" (R. 64). And in answer to a question by the court whether there was "any change other than what is shown there on that paper itself [i. e., the receipt given by the deputy marshal when he received the elec-

tion materials (see R. 53–55)]? Does the paper show it all?," she replied, "All that I recognized as being missing; in other words, when the material came back from the commissioners I am quite sure that some of that material was missing that was checked out by me on the night of the election" (R. 64). On re-cross examination, she denied that "there was some material missing in those boxes that were in there when you turned it over to the commissioner[s]" for tabulation; and when she was asked what she had said was missing, she replied that she "wasn't in the tabulating room and didn't see the stuff put in the boxes and I checked the stuff out to the folks that were impounding the material. I checked it out rigidly to them; but on this other that you asked about that was missing, it didn't come from the boxes" (R. 65). Thus, Mrs. Middleton's entire testimony relevant to the point now raised by petitioners (R. 52–66) shows conclusively that when she said some of the election materials were "different" or "missing" at the time she delivered them to the deputy marshal, she was not referring to the ballot boxes or their contents, the only materials relevant to petitioners' contention. On the contrary, examination of the deputy marshal's receipt, which she said noted all the missing items, plainly shows that all she meant was that, for certain precincts, the stub book, or the secondary stubs, or the sack itself in which the stub book and secondary stubs were supposed to be

contained was missing and had been missing since she received the materials back from the commissioners after they had counted the ballots.

3. Although petitioners do not deny they were duly appointed as the election officials for Mary Helen Precinct 39–A, they contend that there was no proof that they actually served as such officials at the election in question (Pet. 10–12). They say that "It could have been very easy, if these petitioners were guilty, for the Government to have introduced legal voters who appeared at the polls and proven by them, if possible, that the petitioners actually served at the election in question" (Pet. 10). It is true that this fact might have been established by testimony of the character suggested by petitioners, but we submit that the evidence adduced on the issue (*supra,* pp. 3–4) was entirely sufficient without such testimony. Petitioners point only to the evidence that Ledford's and Brock's county warrants in payment for their services as election officials (R. 74–78) were endorsed in their names by one "E. Kelly" (R. 74, 75) and they contend that such evidence does not support an inference that they in fact acted as such officials. This argument, of course, does not avail Metcalf and Lint, but even as to Ledford and Brock, the fact that the warrants were issued to them and were endorsed in their names, even without the other evidence as to their activities in the conduct of the election (*supra,* pp. 3–4), is amply sufficient to support

the inference that they actually fulfilled the duties to which they had been appointed.

CONCLUSION

The decision below is correct and no conflict of decisions or important question is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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